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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CITY OF GALLUP,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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January 19, 1981

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QUESTION PRESENTED

1. Does the Federal Energy Regulatory Commission have the authority to order an increase in rates fixed by contract without complying with the legal standard mandated by this Court in *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956)?

PARTIES TO THE PROCEEDING BELOW

City of Gallup, New Mexico

Federal Energy Regulatory Commission

Public Service Company of New Mexico

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit appears at 628 F.2d 1267 and is reprinted in the Appendix to this petition (App. 1). That opinion affirmed in part and reversed in part orders of the Federal Energy Regulatory Commission (hereinafter FERC or the Commission) in *Public Service Company of New Mexico*, Docket No. E-9454, issued July 5, 1978 (published at 15 FPS 5-383) (App. 67) and December 15, 1978 (unpublished) (App. 70) and orders in

Public Service Company of New Mexico, Docket Nos. ER78-337 and ER78-338, issued June 30, 1978 (unpublished) (App. 24) and December 15, 1978 (unpublished) (App. 38).

Orders issued by the Commission in *Public Service Company of New Mexico*, Docket No. E-9454 were previously affirmed by the court of appeals in *Public Service Co. v. FPC,* 557 F.2d 227 (10th Cir. 1977) (App. 10).

JURISDICTION

The judgment of the court of appeals, review of which is sought, was entered on August 11, 1980. A timely petition for rehearing was denied on October 21, 1980 and this petition for writ of *certiorari* was filed within 90 days of that date. Jurisdiction to review the judgment is conferred on this Court by 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The pertinent statutes are Section 205 of the Federal Power Act, 16 U.S.C.A. §824d (West Supp. 1980) (App. 73) and Section 206 of the Federal Power Act, 16 U.S.C.A. §824e (1976) (App. 76).

STATEMENT OF THE CASE

Petitioner, City of Gallup (hereinafter Gallup) operates a municipal electric company that purchases electric power at wholesale and then resells that power at retail to customers within the municipality. Gallup purchases wholesale power from the Public Service Company of New Mexico (hereinafter PNM) in accordance with a contract having designated fixed rates. The contract was

originally executed in 1962 and amended in 1968 and 1970.[1]

Because Gallup is a wholesale for resale customer of PNM, the PNM-Gallup contract is subject to the jurisdiction of the Federal Energy Regulatory Commission under authority granted that Commission by the Federal Power Act, 16 U.S.C. §824 *et seq.* (1976) (amended 1978). *See FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964).

This petition results from the opinion of the court of appeals, issued August 18, 1980 in *Public Service Co. v. FERC*, 628 F.2d 1267, 1269-70 (10th Cir. 1980), which affirmed rulings made by the Commission to the effect that the standard set forth by this Court for setting aside a fixed rate contract was not applicable to the PNM-Gallup contract. The rulings of the Commission that were affirmed by the court of appeals interpreted the decision rendered by this Court in *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). The procedural history culminating in the court of appeals' opinion below is somewhat complex.

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[1]The contract involved herein, (App. 82-107), contains the following relevant provision:

Article V

(A) *Rates:* All power and energy supplied Consumer by Company hereunder shall be paid for by Consumer at the following monthly rate:

A monthly demand charge of:

$2.00 per KW of monthly billing demand determined as hereinafter provided.

Plus a monthly energy charge of:

3.25 mills ($0.00325) per KW for all electric energy delivered to Consumer by Company during the month.

On April 21, 1975, PNM, without the consent of Gallup, submitted to the Commission revisions to the contract rate schedules for service to Gallup with a designated effective date of July 31, 1975, pursuant to Section 205 of the Federal Power Act.[2] On June 30, 1975, Gallup filed with the Commission a protest and petition to intervene claiming that unilateral rate increases were barred by the terms of Gallup's contract with PNM and the decisions of the Supreme Court in *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

In an order issued on July 31, 1975,[3] the Commission agreed with Gallup's contentions and refused to allow the rate increase to go into effect until after Section 206 hearings had been held, but inconsistently ruled that the burden of proof standard set forth by the Supreme Court did not apply. The Commission reasoned that:

> Since the parties provided for a change in rate only by order issued by the Commission, it is clear they did not contemplate the unilateral filings permitted by Section 205. Accordingly, we shall institute a Section 206(a) proceeding and set the just and reasonable rate for PNM's service to Gallup pursuant

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[2] Under Section 205, a rate increase will become effective unless suspended by the Commission. The maximum amount of time for which the Commission may suspend the increase is five months. After the suspension period expires, the rate increase becomes effective subject to future refunds ordered by the Commission following a hearing investigating the reasonableness of the increase. In contrast, under Section 206 of the Act, 16 U.S.C. §824e (1976) (App. 76), a rate increase cannot become effective until *after* hearings have been conducted.

[3] Order Denying Motion to Reject, Instituting Section 206(a) Proceeding Granting Interventions, and Establishing Dates, Docket No. E-9454 issued July 31, 1975, (App. 45).

to Section 206(a),[5] any change to be prospective in application.

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[5] We note that the procedures under such a Section 206(a) proceeding would not entail meeting the heavy burden of proof associated with the *Mobile-Sierra* decisions.

Order issued July 31, 1975, (App. 49).

Petitions for rehearing filed by both parties were denied by the Commission in an order issued September 26, 1975.[4]

Both Gallup and PNM sought judicial review of the Commission's order. PNM maintained that the contract between the Company and Gallup permitted unilateral rate increases. Gallup argued that the Commission's burden of proof holding violated the rule of *Sierra.*

The Tenth Circuit rejected the contentions of PNM stating that, "we agree with the Commission that the 'Change in Rate' paragraph in the contract did not give or imply a right in PNM to make the unilateral rate filing." *Public Service Co. v. FPC*, 557 F.2d 227, 229-31 (10th Cir. 1977) (App. 18).

Gallup's appeal was dismissed without prejudice on the ground that Gallup was not then aggrieved and could only be adversely affected if the Commission, in the Section 206(a) proceedings, ultimately sought to change Gallup's contract rates. *Id.* at 232-33, (App. 21-23).

Subsequent to this decision, Section 206(a) proceedings were instituted. At the hearing, testimony submitted in support of Gallup's contention that PNM's case for a

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[4] Order Denying Application for Rehearing and Petition for Rehearing, Docket No. E-9454, issued September 26, 1975, (App. 54).

rate increase did not meet the standard established in *Sierra* was stricken from the record. Hearing Transcript Docket No. E-9454, pp. 344-46, December 15, 1976, (App. 119-121).

The administrative law judge proceeded to render an Initial Decision on the Company's presentation without reference to the standard set forth in the *Sierra* case and found that a rate increase was proper. At no time did PNM present any evidence to meet the *Sierra* standard and it is conceded that the record contains no such proof. The Commission again reaffirmed that the *Sierra* standard did not apply and issued its decision approving a rate increase for the City on July 5, 1978, (App. 67).

The second Section 206 hearing was held in June of 1978 following the filing of another proposed rate increase by PNM in April of that year. Once again, the Commission concluded that the evidentiary standard mandated by this Court in *Sierra* did not apply to the Gallup-PNM contract. Order issued June 30, 1978, Docket Nos. ER78-338, ER78-339, (App. 24). In making this finding, the Commission relied on its prior orders of July 31 and September 26, 1975 in the E-9454 docket. Instead of determining whether the existing contract rates were so low as to "adversely affect the public interest," *Sierra,* 350 U.S. at 355, the Commission reviewed the proposed rates to determine whether they were "just and reasonable" as if they had been filed under Section 205.

The Petition of Gallup for rehearing of the July 5, 1978 order issued in Docket No. E-9454 and Gallup's petition for rehearing of the June 30, 1978 order in Docket No. ER78-338 were denied by the Commission on December 15, 1978. Docket No. ER78-337, Order on Rehearing Denying Requested Relief issued December

15, 1978, (App. 38); Docket No. E-9454, Order Denying Rehearing issued December 15, 1978, (App. 70).

The subsequent petition of PNM for review of the agency orders, filed pursuant to Section 313 of the Federal Power Act, 16 U.S.C. §824*l* (1976), (App. 77),[5] was considered by the court of appeals.

In an opinion issued on August 11, 1980, the Tenth Circuit affirmed the Commission's refusal to apply the *Sierra* burden of proof to the Gallup-PNM contract. *Public Service Co. v. FERC*, 628 F.2d 1267 (10th Cir. 1980) (App. 1). The court of appeals, despite the similar language in the Gallup-PNM contract to that in the contract before this Court in the *Sierra* case, reasoned that the parties to the rate contract contemplated Commission-ordered rate changes. Therefore, the contract was not for a "fixed rate" and the *Sierra* standard need not be met in order for the Commission to raise rates above those set by the contract. (App. 5-8).

The Tenth Circuit denied Gallup's petition for rehearing on October 21, 1980, (App. 9), and this timely petition for writ of *certiorari* ensued.

REASONS FOR GRANTING THE WRIT

1. *Conflict With Decisions Of The Supreme Court*

The Tenth Circuit opinion in this case directly conflicts with the decisions of this Court in *United Gas Pipeline Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956) and *Sierra Pacific Power Co. v. FPC*, 350 U.S. 348 (1956).

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[5]This statute provides the basis for jurisdiction in the court of appeals. (This statement is made in compliance with this Court's Rule 21.1(i)).

In *Mobile*, this Court held that the Natural Gas Act did not give utility companies the authority to alter rates set by contract simply by filing a rate increase with the Commission.[6] In so ruling, the Court noted that:

> The very premise that §§4(d) and (e) and 5(a) are alternative rate-changing "procedures" is itself based on a misconception of the structure of the Act. These sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful.

350 U.S. at 340-41.

The Court found that the power given the Commission under the Act to modify any rate contract "is neither a 'ratemaking' nor 'rate-changing' procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them," *id.* at 341, and concluded that:

> In short, the Act provides no "procedure" either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates.

Id. at 343 (emphasis in original).

The *Mobile* Court recognized that denying a utility the authority unilaterally to increase its rates did not "lock

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[6] *Mobile* construed Sections 4(c), (d), (e) and 5(a) of the Natural Gas Act, 15 U.S.C. §§717c(c), (d), (e) and 717d(a) (1976). These statutes are "substantially identical" to Sections 205(c), (d), (e) and 206(a) of the Federal Power Act respectively. *See* Sierra Pac. Power Co. v. FPC, 350 U.S. at 348, 353.

in" companies to their contracts. Under Section 5(a) of the Act, a company could request a Commission investigation of the contract rate:

> And if the Commission, after hearing, determines the contract rate *to be so low as to conflict with the public interest*, it may under §5(a) authorize the natural gas company to file a schedule increasing the rate.

Id. at 345 (emphasis added).

The *Sierra* decision, issued the same day as *Mobile*, extended the *Mobile* holding to the Federal Power Act and instructed the Commission as to the findings that would be necessary to justify a rate *increase* following hearings under Section 206 of the Federal Power Act. In *Sierra*, the Commission had simultaneously found a new rate to be reasonable and an existing rate to be unreasonable. The Commission ruled the existing rate unreasonable solely because it would result in a low rate of return to the utility.

This Court first held that the filing of the new rate was not effective to change the existing contract rate. It went on to consider whether the Commission's finding that the new rate was just and reasonable, "satisfied in substance the requirements of §206(a)." *Sierra*, 350 U.S. at 353. In answering this question in the negative, Mr. Justice Harlan, speaking for a unanimous Court, stated:

> [t]hat the purpose of the power given the Commission by §206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in §201 of the Act that the scheme of regulation imposed "is necessary in the public interest." When §206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either "unjust" or

> "unreasonable" simply because it is unprofitable to the public utility.

Id. at 355.

The Court defined an unjust or unreasonable contract rate as one which is, "*so low as to adversely affect the public interest*—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Id.* at 355 (emphasis added). Thus, the *Mobile-Sierra* decisions distinguish the "just and reasonable" language of Section 205 (which applies when the Commission is *reviewing* a rate increase unilaterally filed by a utility) from the public interest standard to be applied under Section 206 (when the Commission is *ordering* an increase in rates otherwise fixed by contract).[7]

After the *Mobile, Sierra,* and *Memphis* decisions it would seem obvious that "the Commission has no authority, absent a finding that the existing contract rate

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[7]The scope of the *Mobile-Sierra* doctrine was further explained by this Court in *United Gas Pipeline Co. v. Memphis Light Gas and Water Division*, 358 U.S. 103 (1958). In *Memphis*, this Court reiterated that the threshold *Mobile* issue was whether the terms of the rate contract gave the utility the right unilaterally to increase rates. The contract provided that gas would be paid for in accordance with an attached rate schedule, "or any effective superceding rate schedules on file with the Federal Power Commission." *Id.* at 105. The Court found that this contract language did indeed "expressly reserve" to United the right unilaterally to increase rates, *id.* at 112, distinguishing the agreement from the *Mobile* contract which established a "single fixed rate" for a specific time period. *Id.* at 110. The Commission below held that the language of the Gallup-PNM contract was not *Memphis* language and did not give PNM the right to make unilateral rate increases under Section 205, (App. 49). This holding of the Commission was approved by the Tenth Circuit in its first decision (App. 18) which is not at issue at the present time.

'is so low as to have an adverse effect on the public interest' . . . to raise [contract] rates in excess of the maximum authorized [by the existing contract.]" *FPC v. Texaco*, 417 U.S. 380, 391 n.4 (1974). In the instant case, however, the Commission, contrary to the mandate of *Sierra*, did raise rates above the maximum allowed by contract without applying the Section 206 definition of "just and reasonable", i.e., without finding that the existing contract rate adversely affected the public interest. Clearly, both the Commission's decision and the affirming opinion of the Tenth Circuit directly conflict with the holding of *Sierra*.

The Commission and the Tenth Circuit based their decisions on a conclusion that Article II and Article XII of the Gallup-PNM contract demonstrated that the parties to the agreement contemplated Commission-ordered changes in the contract rates, (*see* App. 5). This theory is plainly wrong and in essence permits the Commission to improperly refuse to follow this Court's decisions in the *Mobile-Sierra* cases. First, the language of Article XII of the Gallup-PNM contract is substantively identical to that of Article XII of the *Sierra* contract, (*see* App. 117). The Commission itself had previously ruled that the language of Article II was irrelevant to the question of whether the *Sierra* rule against unilateral rate filings applied, (App. 47). Surely, after *Sierra*, any party contemplating Commission-ordered increases above the contract rate would also contemplate that those changes would only occur if the evidentiary standard of *Sierra* was met. Moreover, even if the Commission's theory is valid, the conflict with *Sierra* still exists. One scours the pages of *Mobile*, *Memphis*, and *Sierra* searching for any language or logic contained therein indicating that the *Sierra* standard will not apply if parties to an agreement envision Commission-ordered rate changes. The search is

futile. Those decisions contain no such language. In effect, the Commission and the Tenth Circuit have assumed away the very issue presented by this petition: whether the Commission may ever raise rates above those fixed by contract without first making the finding required by *Sierra.*

Article V unequivocally fixes the rate to be paid by Gallup for electricity received from PNM. Article II of the contract specifies that the rate is to be constant for a period of twenty-five years. Gallup agreed to close down its generating plant in consideration of PNM's commitment. Plainly, the contract is not a *Memphis* "going rate" agreement. Plainly, the contract does not allow PNM unilaterally to increase its rates. *See Public Service Co. v. FPC,* 557 F.2d 227, 229-31 (10th Cir. 1977) (App. 14-21).

Sierra held that, in such a situation, a finding that the existing contract rate adversely affects the public interest *must* be made before the Commission can raise the rates above the contract level. In this case, the court of appeals and the Commission have held that a lesser standard may be used, even if the utility cannot increase the fixed contract rate unilaterally. The conflict is direct and irreconcilable.

2. *Conflict With Other Circuits*

The Tenth Circuit's reasoning also conflicts with the reasoning applied by the Court of Appeals for the District of Columbia Circuit in answering the threshold *Mobile-Sierra* question concerning the ability of a utility unilaterally to increase rates. In *Boroughs of Chambersburg v. FERC,* 580 F.2d 573 (D.C. Cir. 1978), the District of Columbia Circuit defined a fixed-rate contract as, "one that does not permit a public utility to effect unilateral rate increases merely by filing them with the Commission." *Id.* at 547 n.2.

This definition is consistent with the *Memphis* decision which turned on whether the contract "expressly reserved" to the utility the right unilaterally to increase rates. 358 U.S. at 112. The District of Columbia Circuit has explicitly considered and explicitly rejected the Tenth Circuit's theory that contracts which contemplate regulatory change are not fixed-rate contracts. *E.g., Papago Tribal Utility Authority v. FERC,* 610 F.2d 914, 920-23 (D.C. Cir. 1979); *City of Oglesby v. FERC,* 610 F.2d 890, 911-14 (D.C. Cir. 1979); *Richmond Power & Light v. FPC,* 481 F.2d 490 (D.C. Cir. 1973), *cert. denied,* 414 U.S. 1068.

The theory has been rejected by the District of Columbia Circuit because it is patently unsound. Regardless of whether a party envisions change by the FERC at the time it enters into a rate contract, under the law, such a change is possible.[8] To the extent that such change may occur, a true "fixed-rate" contract will never exist. Thus, a finding that parties to a rate contract "contemplated" change is irrelevant to the determination of whether a contract is one for a fixed rate.[9] In fact, the contract

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[8] As stated by the District of Columbia Circuit:

> The Commission says that the parties contemplated rate changes "by the order or with the approval of" the appropriate regulatory Commission. This may well be true, but it is beside the point. The issue under *Memphis* is not whether the parties contemplated change by the appropriate regulatory authority, *for under the law every electric power contract must contemplate such change.*

Richmond Power & Light, 481 F.2d at 499 (emphasis added).

[9] The Commission itself has refused to accept the logic it follows in this case. In Carolina Power & Light Co., 47 F.P.C. 1 (1972), an administrative law judge ruled:

> *Respondent notes that Rate Schedule RS-4 expressly recognizes that the schedule is subject to change by action of a*

[footnote continued]

before this Court in *Sierra* contemplated regulatory changes.[10] By its terms, the *Sierra* decision applies to all contracts not unilaterally modifiable by a utility under Section 205 procedures. *Sierra* sets the standard for determining when the rates set by such contracts are unjustly and unreasonably low. By refusing to apply that definition in this instance, the Commission and the Tenth Circuit have placed themselves in conflict with the *Sierra* rule as construed by the District of Columbia Circuit relating to what is a fixed rate contract. In order to resolve that conflict, this petition for *certiorari* should be granted.

3. This Case Presents An Important Question

The decision below of the Tenth Circuit should be reviewed because the differing opinions of this Court in *Sierra* and the Tenth Circuit in *City of Gallup v. FERC* raise an important question in the administration of the Federal Power Act. *See Mobile*, 350 U.S. at 337; *Sierra*, 350 U.S. at 352; *Memphis*, 358 U.S. at 109. The court of appeals' misinterpretation of the *Sierra* decision seriously

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> *regulatory body*, and that the Government-Customer Contracts contain a like recognition concerning the rate for deficiency energy. *These are irrelevant considerations. All rates are subject to change by regulatory action, whether or not a contract so provides. That respondent, as it contends, has a right unilaterally to change the rate schedules is a non sequitur.*

Id. at 13-14 (emphasis added). The Commission expressly accepted the law judge's findings. *Id.* at 4.

[10] Section XII of the Sierra-Pacific agreement, (App. 117), read as follows:

> This agreement shall at all times be subject to such changes and/or modifications as said Commission may from time to time direct in the exercises of its jurisdiction.

("Commission" in this clause meant the California Public Utilities Commission.)

frustrates the proper administration of the Federal Power Act.

There are more than 2,000 municipal electric companies in this country.[11] The vast majority of the municipal operations purchase wholesale power pursuant to rate contracts with large investor-owned utilities.

Municipal utilities are not the only entities affected by the FERC's policy of ignoring the *Sierra* decision whenever contracts contain language similar to Article XII. The Commission's interpretation of *Sierra* will apply to all rate contracts subject to Commission jurisdiction. The question of whether contracts permit unilateral rate increases has spawned a significant amount of litigation. *E.g., Towns of Alexandria v. FPC*, 555 F.2d 1020 (D.C. Cir. 1977); *City of Cleveland v. FPC*, 525 F.2d 845 (D.C. Cir. 1976), *compliance directed* 561 F.2d 344 (D.C. Cir. 1977); *Gulf States Utilities Co. v. FPC*, 518 F.2d 450 (D.C. Cir. 1975); *Montaup Electric Co.*, 52 F.P.C. 1865 (1974).

It can be expected that a similar amount of litigation will result if the Commission continues to impose its misinterpretation of *Sierra* on wholesale electric customers. A ruling from this Court on the *Sierra* issue would avoid further repetitive litigation and decrease regulatory delay.

The decision as to whether the *Sierra* burden of proof applies in Section 206 hearings has a significant impact on the nature of the proceedings and the evidence presented. *See Metropolitan Edison Co. v. FERC*, 595 F.2d 851 (D.C. Cir. 1979); *Carolina Power & Light Co.*, 52 F.P.C. 1841 (1974); *Mississippi Power Co.*, 50 F.P.C.

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[11]Public Power Fact Sheet of the American Public Power Association.

885 (1973). If the *Sierra* burden is applied to contracts containing boilerplate "regulatory change" clauses, rate increases which have not met this Court's *Sierra* standard will take effect. If *certiorari* is not granted uncertainty as to the applicability of the *Sierra-Mobile* doctrine to existing contracts will continue for both utilities and their customers.[12]

Most importantly, this Court should continue to oversee the implementation of its decisions, especially where, as here, they have been relied upon by parties in their contractual arrangements. The history of the FERC's response to the *Mobile-Sierra* decisions is one where the agency consistently has sought to avoid compliance by a number of different "end runs", which have been rejected in various decisions. *See City of Kaukauna v. FERC*, 581 F.2d 993 (D.C. Cir. 1978); *Borough of Lansdale v. FPC*, 494 F.2d 1104 (D.C. Cir. 1974) and cases cited *supra* at 13. The present case, however, represents a new type of "end run" which the court below erred in not correcting.

The Commission has made it plain that, "in our judgment the *Mobile-Sierra* rule is inconsistent with sound regulatory policy. That rule has the effect of limiting our authority under Section 206(a) of the Federal Power Act." *Carolina Power & Light Co.*, 47 F.P.C. 1, 4 (1972). *See also Philadelphia Electric Co.*, 48 F.P.C. 422, 424 (1972).

Though the Commission does not like the *Sierra* rule, it cannot ignore the law of the land as set down by

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[12] Under the Federal Power Act, the Commission is required to protect consumers. *See* Permian Basin Area Rate Cases, 390 U.S. 747 (1968); FPC v. Tennessee Gas Co., 371 U.S. 145, 154 (1962); FPC v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944).

decisions of the Supreme Court. This Court must continue to oversee the implementation of *Sierra* in order to ensure that the rule enunciated in that decision is correctly applied by the courts of appeals and the Commission. In this instance, the Commission has interpreted *Sierra* so as to limit severely and significantly the impact of that decision. That interpretation has been affirmed by the Tenth Circuit. This Court should grant *certiorari* to determine whether the FERC interpretation of *Sierra* is valid.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that a writ of *certiorari* issue forthwith to the Tenth Circuit Court of Appeals.

Respectfully submitted,

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